

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SANDY RUSSELL GLOVER,

Defendant-Appellant.

UNPUBLISHED

May 28, 2013

No. 310821

Livingston Circuit Court

LC No. 00-011738-FH

Before: FORT HOOD, P.J., and FITZGERALD and O'CONNELL, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84. The trial court sentenced him as a second habitual offender to 10 to 15 years' imprisonment, which was an upward departure from the sentencing guidelines. Defendant now appeals his sentence as of right.¹ We affirm.

Defendant's conviction arose out of his brutal assault of a prisoner while both men were jailed awaiting trial. Defendant pulled the prisoner to the floor and kicked him repeatedly in the face, as other prisoners blocked the jail guard's view of the area. The assaulted prisoner sustained a broken nose and other facial fractures. At trial, various inmates testified about the assault, as did a prison guard.

At sentencing, the trial court assessed 50 points against defendant on the prior record variables (PRVs), and 70 points against defendant on the offense variables (OVs). Those assessments placed defendant in the E-V cell of the guideline grid for Class D offenses. MCL 777.65. The guidelines minimum sentence range for a second habitual offender in the E-V cell was 34 to 83 months. *Id.* The statutory maximum sentence was 15 years. MCL 750.84(1); MCL 769.10. The prosecutor argued in this case that the court should sentence defendant at the maximum sentencing guidelines, or should exceed the guidelines. The trial court agreed and

¹ In *Glover v Birkett*, unpublished opinion and order of the United States District Court for the Eastern District of Michigan, issued April 25, 2011 (Docket No. 07-cv-11912), aff'd 679 F 3d 936 (CA 6, 2012), the federal court conditionally granted defendant's petition for a writ of habeas corpus on the basis of ineffective assistance of appellate counsel.

sentenced defendant to a minimum of 10 years imprisonment, which was exactly two-thirds of the 15 year statutory maximum.

On appeal, defendant first argues that the trial court did not articulate substantial and compelling reasons for its upward departure from the sentencing guidelines. A court may depart from the sentencing guidelines range if it states substantial and compelling reasons for the departure on the record. MCL 769.34(3); *People v Buehler*, 477 Mich 18, 24; 727 NW2d 127 (2007). The factors supporting a departure sentence must justify the particular departure made, must be objective and verifiable, must keenly attract the court's attention, and must be of considerable worth. *People v Smith*, 482 Mich 292, 299; 754 NW2d 284 (2008). To be objective and verifiable, the factors must be actions or occurrences external to the mind and must be capable of being confirmed. *People v Horn*, 279 Mich App 31, 43 n 6; 755 NW2d 212 (2008). We review for clear error the trial court's determination of whether a particular factor exists; we review de novo whether the factor is objective and verifiable; and we review for abuse of discretion the trial court's determination that the factors constituted substantial and compelling reasons for departure. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003). Moreover, we review the amount of the departure for abuse of discretion. *Smith*, 482 Mich at 300.

A trial court's articulation of the grounds for a particular departure must be "sufficiently detailed for appellate review." *Smith*, 482 Mich at 311. This Court must review the whole record and determine whether the connection between the reasons given for departure and the extent of departure are clear. *Id.* at 314. We must vacate departure sentences that are based on "aberrational or idiosyncratic" sentencing decisions. *Id.* at 321 (Markman, J., concurring).

In this case, there was nothing aberrational or idiosyncratic about the trial court's sentencing decision. The trial court made several findings in support of its decision to depart upward from the sentencing guidelines. Regarding the factors supporting the departure, the trial court stated, "My sentence is based not on plea negotiations, but what came before me and what I heard in the trial." Regarding the attack, the court said to defendant, "you took it upon yourself to become the prosecutor, the judge, the jury and the executioner." The court continued, "you were the leader of a conspiracy in the, in the [sic] conspiracy itself and in the attack wherein you inflicted these injuries on [the assaulted prisoner]."

The court then explained its reasons for departing upward from the sentencing guidelines as follows:

The guidelines do not adequately take into consideration the nature of this offense. A victim at the mercy of the cell block fired up by you and the offense was executed in a manner so as to have other persons block off the view of the officers in the cell block so that they could not see what was going on and to afford you protection for the crime that you were committing.

It was a cowardly offense, Mr. Glover. Cowardly. And you put everybody at risk, including the guards.

These statements were adequate to affirm the upward departure sentence. We discern no clear error in the trial court's factual determinations, and we conclude that the factors on which the trial court relied were objective and verifiable. We recognize that two of the factors identified by the trial court were similar to OV factors assessed in the guidelines. However, a court may depart from the sentencing guidelines range based on an offense variable already considered in determining the guidelines range if the court finds, based on facts in the record, that the variable was given inadequate or disproportionate weight. MCL 769.34(3); *People v Harper*, 479 Mich 599, 616-617; 739 NW2d 523 (2007). To ascertain whether a factor was given inadequate or disproportionate weight, a court must determine the effect of the factor on the recommended minimum sentence range. *People v Young*, 276 Mich App 446, 451; 740 NW2d 347 (2007).

Here, defendant was assessed ten points under OV 14, which addresses an offender's leadership role in a multiple offender situation. MCL 777.44. However, OV 14 does not reflect the particular peril involved in this case: a jail conspiracy to conduct a brutal assault. As the trial court correctly noted, the jail conspiracy not only endangered the assaulted prisoner, but also imperiled other prisoners and the jail staff. Moreover, even without the 10 point score for OV 14, defendant would remain in the E-V sentencing cell. Therefore, the trial court was within its discretion in determining that OV 14 did not adequately reflect defendant's role in the assault.

Similarly, the 25 point assessment against defendant on OV 19 did not adequately reflect the gravity of the offense in this case. The court assessed points for OV 19 because the assault "threatened the security of a penal institution." MCL 777.49(a). However, the court also explained that the assaulted prisoner in this case was "at the mercy of the cell block" that had been "fired up" by defendant. Further, the court noted that the attack was executed with inmates forming a barrier so that the guard could not see defendant's actions. The court's findings demonstrate that defendant's behavior not only threatened the security of the jail within the meaning of OV 19, but that his behavior also resulted in a significant security breach. The jail guard testified that the gathering of inmates blocked his view of the assault. Accordingly, the trial court was within its discretion when it considered the nature of the offense as a ground for an upward departure from the minimum sentence range.

In addition, the trial court's finding with regard to defendant's actions as "prosecutor, judge, jury, and executioner," was a substantial and compelling reason to depart from the sentencing guidelines. The trial court explained that while defendant enjoyed the presumption of innocence, he took the law into his own hands and inflicted a punishment on another prisoner. This behavior was not accounted for in the guidelines. It is also objective and verifiable and does not exist in all cases. Thus, this was a substantial and compelling reason to depart from the sentencing guidelines.

The trial court's findings, and its decision to sentence defendant to two-thirds of the statutory maximum, demonstrate the basis for the degree of departure in this case. An upward departure from the sentencing guidelines in this case could not exceed 10 years (two-thirds of the statutory maximum). MCL 769.34(2)(b). After presiding over the trial and after hearing specific evidence concerning threats defendant made against an assistant prosecutor, the trial court imposed a minimum 10-year sentence. No inference is necessary to recognize that the trial court intended to apply the specific upward departure necessary to impose the maximum available

sentence. We conclude the trial court was within its discretion in establishing the degree of the departure sentence.

Defendant next asserts that the trial court erred when it failed to strike inaccurate information from the presentence investigation report (“PSIR”). Specially, defendant claims the trial court erred when it declined to strike defendant’s threat to have an assistant prosecutor killed upon his release from custody. “We review the sentencing court’s response to a claim of inaccuracies in defendant’s PSIR for an abuse of discretion.” *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003). The court must address challenges to the accuracy of the information in a presentence report and may “determine the accuracy of the information, accept the defendant’s version, or simply disregard the challenged information.” *Id.*

Here, the trial court took testimony at the sentencing hearing to ascertain the factual accuracy of the information. The assistant prosecutor testified that a defense attorney told her that his client had informed him that defendant had made a threat against her life. A police detective testified that he investigated the threat. He confirmed that the defense attorney had heard of the threat from his client. Defendant denied making the threat, but acknowledged that if he saw the assistant prosecutor beaten on a roadside, he would not stop to help her. Based on the testimony, the trial court found that defendant made the alleged threat. We conclude that the trial court was within its discretion in making this finding. Therefore, the challenged statement may remain in the PSIR.

Affirmed.

/s/ Karen M. Fort Hood
/s/ E. Thomas Fitzgerald
/s/ Peter D. O’Connell